National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 30, 1998

TO: Rosemary Pye, Regional Director, Region 1

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Malden Hospital, Case 1-CA-35171

177-1667, 530-4090-5000, 530-6067-6001-3700, 530-4825-7500, 530-6067-6001-3720, 530-6067-6067-3100, 530-6067-6067-5200, 530-6067-6067-9200, 530-6067-6067-9500

This Section 8(a)(5) and (1) case was submitted for advice as to whether an employer is obligated, subsequent to the execution of a merger agreement, to provide information regarding the status and content of merger talks as they progress toward implementation, by providing periodic updates to the union.

FACTS

Massachusetts Nurses Association, hereinafter the Union, represents just under 200 health care professionals and Registered Nurses (RNs) at the Malden Hospital. The collective-bargaining agreement was effective July 1, 1995 through September 30, 1997, but was extended by mutual agreement first until October 31, and then extended again until November 30.[(1)]

Eileen Norton, a Union representative, was called in mid-February[(2)] by two Hospital bargaining unit employees who read an article in the local newspaper regarding the sale of the Employer to Columbia/HCA Healthcare. Soon after speaking with the two employees, Norton sent a letter to the president of the Hospital, Stanley Krygowski, requesting the following information:

(a) Any documents regarding a sale, corporate merger, consolidation, affiliation and/or the development of a joint venture between Malden and any other Health Care System.

If you contend that no such documents exist, please provide a detailed explanation of the relationship between Malden and any Health Care System, including but not limited to any current or planned cooperative undertakings by and between those organizations.

(b) Any documents relating to plans for altering the operation of Malden arising from any possible changes in Malden's status described above, including but not limited to documents regarding any plans, if any, to eliminate any nursing units, layoff members of the bargaining unit, interchange personnel with the other hospitals, change the budgeting and funding sources for, operationally integrate the hospitals, or integrate the management of the hospitals. If you contend that no such documents exists, please provide a detailed description of Malden's plans in any of the areas listed in the preceding sentence.

(c) Any documents relating to current or planned future status of Malden and a Health Care System as sub-corporations of a parent corporation; if you claim that no such documents exist, please provide information in that regard.

By letter dated March 10, Employer attorney Stephen B. Perlman responded to Norton's letter, stating that he was not aware of any legal obligation for the Hospital to provide information along the lines requested, but he would appreciate any reference to cases which describe such a duty.[(3)] Norton replied by letter dated March 21, referencing Providence Hospital, 320 NLRB 790 (1996), enfd. 93 F.3d 1012 (lst Cir. 1996). Perlman responded by letter dated April 1 that he believed there were crucial differences between the two situations. In Providence Hospital, he noted, the boards had already voted to affiliate, a memorandum of intent to affiliate had been signed by the parent organizations, and the planned merger had been presented to the employees and the media as a "fait accompli."

Perlman noted that the current merger discussions, unlike those described in Providence Hospital, were not "sufficiently advanced" so as to warrant any preparation for effects bargaining. Thus, no memorandum of intent had been executed, and no determinations had been made regarding Malden Hospital. Perlman asserted that any discussions in which the Hospital was involved were "still in the exploratory stages."

By letter dated April 4, Norton disputed Perlman's interpretation of the Providence Hospital case, and noted that if confidentiality was the Hospital's concern, it bore the burden of explaining why. Norton further stated that because the collective-bargaining agreement expired on September 30, the information was necessary and relevant to the preparations for contract negotiations. In late April, having received no response from the Hospital, Norton filed the instant 8(a)(5) charge.

On July 21, Krygowski conducted an employee meeting where he announced that the Malden Hospital trustees had voted to merge with Melrose-Wakefield Hospital, Whidden Memorial Hospital, and Lawrence Memorial, three area hospitals. On July 22, The Boston Globe reported the merger. By letter to Perlman dated August 5, Jack J. Canzoneri, the Union's attorney, reiterated the Union's request for information, noting that it was not obligated to do so because its February 24 information request was of a continuing nature.

By letter dated August 12, Perlman acknowledged receipt of the Union's letter and stated that he was compiling the information to respond to the Union's August 5 letter, but that he first needed to obtain the "necessary client clearances." Perlman concluded that he expected to be able to respond by early the following week.

By cover letter dated August 19, Perlman provided Canzoneri with a "redacted version of the merger proposal/agreement among Lawrence Memorial Association, Inc., UniCare Health System, Inc. and North Suburban Health System, Inc."[(4)] Perlman stated that the redacted portions are limited to those portions which are "patently irrelevant to any legitimate interest of the MNA and the involved institutions do not wish to disclose." In closing, Perlman adds that:

...even as redacted, the enclosed documents contain business information that is not in general currency and is considered confidential by the signatory entities and not subject to disclosure. Accordingly, the enclosed is provided to you upon the express condition that it will not be disclosed to any individual outside the MNA and will be used only for purposes pursuant to the NLRA.

Finally, Perlman requested that the copy be returned to him until a mutually acceptable confidentially agreement could be worked out if his conditions are not acceptable to the Union.

By letter dated August 22, Canzoneri asserted that Perlman's confidentially terms were "overly restrictive," and he requested bargaining to reach a more acceptable confidentiality agreement. In addition, Canzoneri noted that the redacted portions of the document were not sufficiently described to allow the MNA to independently assess whether those portions were lawfully excluded or for what reason the information was redacted (i.e., confidentially, relevancy or because the "involved institutions do not wish to disclose"). Canzoneri also pointed out that a number of documents were referenced in the merger agreement but were not provided, even though they appeared to be relevant and responsive to the Union's request. Finally, Canzoneri stated:

...there is little, if any, information in your cover letter or the merger proposal in response to MNA's information request as it relates to plans for operational changes arising from a merger. Thus, MNA does not know whether such plans exist or status and content of any discussions regarding operational changes assuming they have not yet reached a conclusion. Even assuming arguendo that the involved institutions have not reached a final decision as to what operational plans to implement, the Hospital has not indicated whether there have been any ongoing discussions regarding operational changes and the status and content of such discussions. In these further respects MNA believes that the Hospital's response is deficient.

Due to Perlman's planned vacation, the Hospital did not respond until September 18, when Perlman and Canzoneri spoke over the telephone. In that conversation, as described in Canzoneri's confirming letter to Perlman of September 18, the Hospital agreed to reduce its confidentiality proposal to writing by the following week. Regarding the seven items identified by Canzoneri as supporting documents which were referenced in the merger document, Perlman agreed to provide items one through five, but maintained that items six (business plan) and seven (strategic plan) did not contain relevant information. Canzoneri requested in his September 18 letter that Perlman advise him by the following week of the specific nature and

content of those items so that the Union could independently assess whether the items were relevant and necessary. In addition, Canzoneri repeated what he understood was the further information supplied by Perlman regarding the redacted portions of the merger document. In this regard, Canzoneri asked only that the last portion, Section 21, be further explained so the Union could determine independently possible relevance to its concerns.[(5)] Finally, Canzoneri again noted that the Union had not received any information about the status and content of any plans for operational changes, and that Perlman had agreed in the telephone conversation to confirm whether and to what extent the Hospital would provide such information.

The Employer's position is that there is no statutory language, regulation or case law that creates an obligation to provide such tenuous information. In a September 23 letter to the Union, Perlman maintains that, "on this theory, I would be obligated to call you every time some tentative idea, brainstorming session, or single sentence was uttered by Hospital administrators, managers and/or supervisors on a topic of a possible operational change, even before the merging entities had undertaken a decision making process...." The requests for information regarding operational changes, in the Hospital's view, are simply premature.**DATE:**

Perlman stated that no decisions had "yet been made concerning such operational changes, and...these will become the subject of study before any decisions are made with sufficient finality to trigger any statutory obligation to disclose these to the MNA." Perlman said he did not agree with Canzoneri's interpretation of the law and that contacting the Union every time some possible operational change was discussed was "simply not feasible."

Perlman also stated that he would not provide the business plan because the Hospitals considered that information too sensitive and confidential. In addition, Perlman stated that the strategic plan does not yet exist and would "not be developed until after the closing of the transaction." Perlman further stated that he would entertain ideas from the Union as to how he can provide more information about the redacted portion of Section 21 of the merger document without actually telling the Union what the business interest is. Finally, Perlman addressed Canzoneri's request for information on the status and content of operational changes.

Canzoneri asserts in a September 25 letter that the information is relevant to the Union for three reasons:

(1) MNA needs information that is sufficient for it to confirm independently assertions by the Hospital that matters are, inter alia, at an "exploratory" point, not yet "ripe" for bargaining, confidential, or irrelevant.

(2) If MNA learns that various options are being considered in the interim prior to final decision, it may find it appropriate to apprise the employer prospectively of its effects bargaining positions regarding such matters. That in turn may affect how the bargaining unit will be impacted.

(3) MNA needs the information to answer inquiries from its membership as to whether and how it will be impacted by a merger. Also, this information is needed for MNA to formulate proposals and respond to employer proposals during collective bargaining negotiations that address such impacts before they are implemented. Thus, MNA may be able to secure an agreement with the Hospital for provisions in the collective bargaining agreement which pertain to impacts enforceable through the contractual grievance procedure, rather than effects bargaining accords that are outside of the collective bargaining agreement and may or may not be subject to grievance procedure.

Additionally, Canzoneri describes what the Union believes "constitutes information about the 'status and content' of ongoing discussions:"

...some guideposts which probably would mark a material change in the course of discussions: the parties are "brain storming" numerous options; there is a concrete consideration of several identified options; only a few identified options remain on the table; the parties have decided upon one identified option and are negotiating the details of such options; the parties have submitted a draft agreement to the decision-makers for further input; and, the parties are in the process of drafting final agreement with execution planned for a particular date.

Canzoneri summarized the above as "an obligation to produce summaries periodically as necessary to apprise MNA of material changes in the status and content of such discussions from inception to a final decision." This, he asserted, is not akin

to reporting to the MNA on a daily basis "each and every nuance" or every single sentence uttered by manager, as Perlman contended in his letter of September 23.

By letter dated September 29, the Hospital provided copies of documents one through five referenced in the merger document, but failed to provide the completed business plan or strategic plan. Perlman explained that the business plan dated June 13, 1997 and referred to in the July 18, 1997 merger proposal/agreement that he sent to the Union on August 17, was no longer operative and that a new business plan was in the process of preparation. He stated that since there was "no business plan that describes the current realities and projections with sufficient finality to raise a question of disclosure, your request for this document too is premature."

By letter dated October 3, Canzoneri again asked "that the Hospital apprise [the Union] of the status and content of all discussions relating to matters within the scope of its information request(s), including without limitation information about the business plan and strategic plan."

ACTION

We agree with the Region that the Employer is not required to provide information regarding the status and content of merger talks as they progress toward implementation, by providing periodic updates to the Union, and that absent withdrawal, this Section 8(a)(1) and (5) charge should be dismissed for the reasons set forth below.

It is well established that, as part of its duty to bargain in good faith, an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative. This includes information that is relevant and reasonably necessary for negotiating or administering and policing a collective bargaining agreement.[(6)]

Thus, while information pertaining to mandatory subjects of bargaining is presumptively relevant, information not on its face directly related to mandatory subjects must be produced only if the union can make a showing of its relevance to the collective bargaining process.[(7)] Further, the Board has held in merger situations that a union is entitled to the formal decisional agreements executed between the parties, so that the union can bargain about the effects of the merger on its members.[(8)] However, since a union may bargain only about the "effects" of the merger decision, it may not "request information for the purpose of intruding into the negotiations between merger partners."[(9)] The Board has also held that where an employer is not obligated to bargain over a decision, it is not obligated to furnish information concerning that decision.[(10)]

The Supreme Court held in Detroit Edison[(11)] that when an employer asserts a legitimate interest in maintaining confidentiality, the employer may condition the disclosure of the information.[(12)] Upon a request for relevant confidential information, the parties have an obligation to bargain in good faith regarding conditions under which such information may be supplied to the union while protecting legitimate confidentiality concerns.[(13)] Thus, the Board has held that an employer's failure to release confidential information is not unlawful if the union fails to bargain with the employer over the terms of its conditional release.[(14)]

We initially note that the Hospital has supplied the Union with some timely information concerning the merger. Thus, while the Union requested information as early as February, the Hospital's trustees did not vote to merge until July 21. The Hospital nevertheless responded within a month to the Union's request for documents regarding the "sale, corporate merger, consolidation, affiliation and/or the development of a joint venture between Malden and any other Health Care System" by explaining that no memorandum of intent had been executed and no determination had been made regarding Malden Hospital. Within a month of the decision to merge, the Hospital's attorney provided the Union with a redacted version of the merger proposal, accompanied by a proposed agreement concerning confidentiality and a request to return the documents if the confidentiality provisions were not acceptable. The Hospital's attorney later supplied the Union with five of the seven supporting documents referenced in the merger document, and explained that he would not provide the business plan because it did not contain relevant information and further that the hospitals considered it too sensitive and confidential. The Hospital's attorney also explained that the strategic plan did not yet exist and would not be developed until after the merger transaction

was completed. In a subsequent letter, the Hospital's attorney stated that the business plan referenced in the merger document was no longer operative and that a new business plan was in the process of preparation, so the Union's request for this document was also premature. Thus, the Employer did not absolutely refuse to provide the Union with the business and strategic plans; it explained that the documents were not yet complete and sought confidentiality assurances for their production in the future. Until certain decisions are made, the Union is not entitled to such information as the business and strategic plan which may eventually be necessary for bargaining over the effects of those decisions. However, once the Employer has finalized those plans, the Union is entitled to relevant information from those plans to engage in effects bargaining.

Moreover, such a response does not violate the Act insofar as the Union seeks information which the Hospital is not required to furnish at all. In this regard, the Union has requested information about the status and content of ongoing discussions regarding the implementation of the merger, i.e., deliberations before decisions have been made: "brain storming" numerous options; concrete consideration of several identified options; certain identified options remaining on the table; decision upon one identified option and negotiation on the details of such option; a draft agreement submitted to the decision-makers for further input; and a draft of the final agreement with execution planned for a particular date. The Union is essentially asking to be included in the decisions concerning the implementation of the merger. The Board has never held that such deliberative material is presumptively relevant to bargaining about the effects of a non-mandatory decision to merge. The Union "cannot demand bargaining over effects that are purely speculative, ephemeral, or too far removed from the underlying activity." (15)

The First Circuit in Northeast Airlines articulated why a union is not included in such decision making:

To require an employer to include the union,. . . in discussions concerning a possible sale of the business would infringe greatly upon his control over his investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. [Citation omitted.] Unlike a proposed subcontract, merger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining. Nor are the employees in a position to judge the complex financial considerations often involved. The economic necessity for a merger cannot be eliminated by bargaining in the same way as could Fibreboard's need to subcontract its maintenance work. (16)

In sum, the Union is not entitled to receive status and content reports which it is seeking. Additionally, the Union has received relevant information concerning the merger including the formal merger document executed between the parties and several supporting documents referenced therein. The Hospital's attorney has supplied certain confidential documents based on a confidentiality agreement, and solicited the Union's suggestions about the hospitals' confidentiality concerns on other documents. The charge, therefore, should be dismissed, absent withdrawal.

B.J.K.

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[1] The Union contends that the sticking point in the negotiations is the Employer's proposal to float nurses and professionals to the other three hospitals with which it is merging.

[2] All dates are in 1997 unless noted otherwise.

[3] Perlman's letter acknowledges that the Employer has an obligation to engage in effects bargaining regarding the impact of a decision to merge.

[4] These are the names of the parent corporations of the hospitals mentioned above.

[5] Section 21 addresses an agreement by the merging entities to pursue an unspecified business interest in the future. Perlman has refused to provide any further description of the business interest to the Union or to the Region.

[6] NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[7] Detroit Edison Co., v. NLRB, 440 U.S. 301, 303 (1979); San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977); Bohemia, Inc., 272 NLRB 1128, 1129 (1984).

[8] Children's Hospital, 312 NLRB 920, 930 (1993) (union entitled to copy of merger agreement to bargain about the "potential impact of the merger on the bargaining unit"); Mary Thompson Hospital, 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991) (same).

[9] Providence and Mercy Hospitals v. NLRB, 93 F.3d 1012, 1018 (1st Cir. 1996). See also Potomac Electric Power Company and/or Constellation Energy Corp., its agent and/or Transition Management Team, its agent, Case 5-CA-26681, Advice Memorandum dated July 31, 1997; International Association of Machinist and Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir. 1972).

[10] BC Industries, 307 NLRB 1275 fn.2 (1992).

[11] Detroit Edison Co. v. NLRB, 440 U.S. at 318.

[12] Id. at 318-320.

[13] See Minnesota Mining & Manufacturing Co., 261 NLRB 27, 32 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983); Borden Chemical, 261 NLRB 64, 65 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983).

[14] Bacardi Corp., 296 NLRB 1220, 1223-1224 (1989) (no violation where union failed to respond to employer's bargaining request over release of confidential medical information); Century Air Freight, 284 NLRB 730, 734-735 (1987) (no violation where union failed to respond to employer's offer to release confidential financial information only to the union's accountant or attorney).

[15] See Providence and Mercy Hospitals v. NLRB, 93 F.3d at 1019, citing Detroit Edison, 440 U.S. at 314-315.

[16] International Association of Machinist and Aerospace Workers v. Northeast Airlines, *supra*, 473 F.2d at 557.